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No. 14-452

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SIDNEY J. GLEASON,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT[1]

All three Respondents make two arguments: (1) the jury instructions in these cases fail the *Boyde v. California* standard because these instructions were ambiguous, creating a reasonable likelihood jurors might have understood the instructions to preclude them from giving effect to mitigating circumstances; Gleason Br. 10-33; RC Br. 37-48, 47-51, 55-58; JC Br. 43; and (2) the Kansas Supreme Court's decision rested on an adequate and independent state ground. Gleason Br. 33-40; RC Br. 43 n.5; JC Br. 43. Respondents' arguments lack merit and fail to address the question actually presented: whether the Eighth Amendment requires a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt."

The Kansas Supreme Court adopted a *per se* Eighth Amendment rule requiring affirmative instructions on the burden of proof (or lack thereof) regarding mitigating circumstances, and that is the question Kansas presented to this Court. Specifically, the Kansas Supreme Court held that the trial court's failure "to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt" violated the Eighth Amendment. Gleason App. 103. The dissent below perceived the majority as holding "that *a per se violation* of the Eighth

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[1] Because the Court desires to address the "mitigation instruction" question in the first hour of oral argument and the "severance" question in the second hour, this reply addresses the mitigation instruction arguments of Respondents Gleason, J. Carr (14-449), and R. Carr (14-450) in these overlapping cases.

Amendment occurs if a jury instruction ... fails to affirmatively state that mitigation evidence need not be proved beyond a reasonable doubt." *Id.* at 121-122. That the Kansas Supreme Court adopted a *per se* rule is demonstrated conclusively by its summary finding of error on this basis in both *Carr* cases. In those cases, the court simply reversed without analysis, citing *Gleason*. RC App. 446; JC App. 47. On the merits, a *per se* rule cannot withstand scrutiny. The Court's Eighth Amendment cases consistently reject the imposition of *per se* requirements for States' rules for the consideration of mitigation evidence. *Zant v. Stephens*, 462 U.S. 862, 890 (1983) ("the Constitution does not require a state to adopt specific standards"); *Boyde v. California*, 494 U.S. 370, 377 (1990) ("States are free to structure and shape consideration of mitigating evidence"); *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (the State is not "precluded from specifying how mitigating circumstances are to be proved").

Respondents do not directly address the question presented, and they further pretend not to defend a *per se* rule. Instead, they purport to argue for a case-specific analysis under *Boyde*. Their arguments, however, effectively seek a *per se* instructional rule. Tellingly, they do not (and cannot) offer any alternative satisfactory instructions to cure their complaints *other than* an instruction explicitly informing the jury there is no burden of proof for mitigation under Kansas law. Even an instruction that stated mitigation "need not be proven beyond a reasonable doubt" likely would not satisfy them. No doubt they would then argue the instruction was misleading because it did not explicitly inform the jury there is *no* burden of proof.

Moreover, on these records, the State satisfied the *Boyde* analysis. In all three cases, the instructions repeatedly informed the jury it had broad discretion to consider any and all mitigation evidence. Nowhere did the instructions impose, suggest, or imply that mitigation was subject to a burden of proof. Indeed, in Kansas the jury is given an instruction that explicitly informs the jury it can consider "mercy" as mitigation sufficient to decline to impose the death penalty, irrespective of any mitigation evidence presented, much less proven.

The State's response to the mitigation evidence in all three cases was to (1) question whether *any* evidence had been produced about *some* alleged mitigating circumstances and (2) argue that mitigation evidence did not outweigh the strong and unrebutted proof of aggravating factors. In none of these cases did the State argue, suggest, or imply Respondents had failed to meet a burden of proof for mitigation. In all three cases, counsel for both the State and Respondents argued repeatedly that the jury had unfettered discretion to determine what constituted mitigation and what weight or effect to give that evidence.

The Kansas Supreme Court's decisions must be reversed.

ARGUMENT

I. Respondents fail to defend the Kansas Supreme Court's actual holding that the Eighth Amendment requires a *per se* rule that capital sentencing juries be affirmatively instructed that mitigating circumstances need not be proven beyond a reasonable doubt.

A. Contrary to Respondents' claims, the Kansas Supreme Court mandated a *per se* rule for instructing juries on mitigating circumstances, and the court did so entirely to satisfy the Eighth Amendment, not Kansas law.

1. The Kansas Supreme Court adopted a *per se* rule.

Respondents argue the Kansas Supreme Court did not adopt a *per se* rule. Gleason Br. 1-2; RC Br. (i), 35-55; JC Br. 43. They are wrong.

First, in *Gleason* the court *said* it had adopted such a rule. The court emphasized its "repeated *recognition of the required content* of penalty phase mitigating circumstances instructions" that mitigation "need[s] to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and *not beyond a reasonable doubt*." Gleason App. 99 (emphasis added). The court "recogni[zed]" this "required content" because it "implicate[s] the broader Eighth Amendment principle prohibiting barriers that preclude a sentencer's consideration of all relevant mitigating evidence." *Id.* at 99-100. As a result, the Kansas court held categorically "that capital juries in Kansas must be informed that mitigating circumstances need not be

proven beyond a reasonable doubt," *id.* at 103, and any failure to give that express instruction requires reversal. *Id.*; see also RC App. 446; JC App. 47.

Second, the *Gleason* dissent captured the majority's holding:

> The majority's conclusion appears to be that a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigation evidence need not be proved beyond a reasonable doubt.

Gleason App. 121. The same dissenter applied that assessment to both *Carr* cases. RC App. 481-483; JC App. 63-65.

Third, the Kansas Supreme Court's summary disposition of this issue in both *Carr* cases convincingly demonstrates a *per se* rule at work. In those opinions, issued one week after *Gleason*, the court found the same "mitigation instruction" error without conducting *any* case-specific or fact-specific analysis under *Boyde v. California*, 494 U.S. 370 (1990). RC App. 446; JC App. 47. The court did not evaluate the instructions given in the *Carr* cases, the parties' closing arguments or the actual mitigation evidence presented. Instead, the Kansas Supreme Court simply referenced *Gleason* and concluded:

> When nothing in the instructions mentions any burden other than "beyond a reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response

> to" mitigating evidence, implicating a defendant's right to individualized sentencing under the Eighth Amendment. *Gleason*, 299 Kan. at ___, 329 P.3d 1102, 1148 (citing *Scott*, 286 Kan. at 107, 183 P.3d 801). This is unacceptable.
>
> Were we not already vacating ... Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so.

RC App. 446; JC App. 512. That is a *per se* rule.

Fourth, in none of these cases did the Kansas Supreme Court conduct anything resembling a *Boyde* analysis; it did the most (though not much) in *Gleason*, but even then it offered only conclusory statements. Gleason App. 103.

The deafening silence of all three Respondents' refusal to defend the *per se* rule the Kansas Supreme Court actually applied in each of these cases confirms the indefensibility of the novel decisions below.

2. The Kansas Supreme Court's *per se* rule rests entirely on federal constitutional grounds.

Contrary to Respondents' assertions, the Kansas Supreme Court's *per se* rule is entirely grounded in that court's interpretation of the Eighth Amendment, not in state law. Respondents' so-called "adequate and independent state grounds" arguments—previously advanced unsuccessfully in opposition to the grants of certiorari in these cases—in fact *demonstrate* the

Kansas court's federal constitutional error. The Kansas Supreme Court first announced the capital sentencing rule at issue here in *State v. Kleypas*, 40 P.3d 139 (Kan. 2001). There, the court declared:

> [A]ny instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision *and not beyond a reasonable doubt* ....

Id. at 268 (emphasis added). The court merely relied on the emphasized language above in finding error in *State v. Scott*, 183 P.3d 801, 837 (Kan. 2008). The court then cited *Kleypas* and *Scott* in identifying purported federal constitutional error in *Gleason*, Gleason App. 101, 103, and still later cited *Gleason* in reversing both *Carr* cases.

Contrary to Respondents' assertions, the Kansas Supreme Court constructed this *per se* rule entirely from its understanding of Eighth Amendment requirements.[2] *Kleypas* and *Scott* refer to potential jury unanimity requirement concerns, and the Kansas court discusses and relies upon this Court's decisions in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), in reaching its conclusions. *See Kleypas*, 40 P.3d at 267-268 (discussing and applying *Mills* and *McKoy*); *Scott*, 183 P.3d at 837-838 (referring to *Kleypas* and *Mills*). This Court previously rejected this pyramid-scheme

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[2] In *Gleason*, the Kansas Supreme Court repeatedly invoked the Eighth Amendment. Gleason App. 99-100 (eight mentions by majority), *id.* at 120-24, 127-28 (eighteen mentions by dissent).

approach to asserting an adequate and independent state ground because "*Kleypas*, itself, rested on federal law." *Kansas v. Marsh*, 548 U.S. 163, 169 (2006).

In fact, the Kansas Supreme Court itself acknowledged that *Kleypas* is grounded in the Eighth Amendment:

> Notably, Gleason's argument rests on *Kleypas*' first statement regarding the required content of mitigating instructions, while only the second *Kleypas* statement implicates the *Mills/McKoy* prohibition against a jury unanimity requirement as discussed in *Kleypas* and *Scott*. But we find this to be a distinction without a difference because *both* recommended statements from *Kleypas* implicate the *broader Eighth Amendment principle* prohibiting barriers that preclude a sentencer's consideration of all relevant mitigating evidence.

Gleason App. 99-100 (emphasis added).[3]

Thus, *Gleason*'s *per se* rule rests on the Eighth Amendment, not Kansas law. This Court has jurisdiction to review the Kansas Supreme Court's *per se* Eighth Amendment rule.[4]

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[3] The inevitable consequence of failing to follow the Kansas court's "recommended" method of complying with the "broader Eighth Amendment principle" is automatic reversal of any death sentence imposed. That, of course, is how *per se* rules operate.

[4] Counsel for the capital defendant in *Kansas v. Marsh*, 548 U.S. at 169, unsuccessfully made the same erroneous argument that *Kleypas* rests on state grounds:

Persistent repetition of a misguided argument cannot transform Eighth Amendment error into an "adequate and independent state ground." The Kansas Supreme Court's increasingly cursory application of its *per se* rule instead of the *Boyde* analysis is precisely the reason this Court should repudiate the Kansas court's approach.[5]

> Marsh maintains that the Kansas Supreme Court's decision was based [on] ... state law, and not the constitutionality of that provision under federal law, the latter issue having been resolved by the Kansas Supreme Court in *State v. Kleypas* .... Marsh's argument fails.
>
> *Kleypas*, itself, rested on federal law. In rendering its determination here, the Kansas Supreme Court observed that *Kleypas*, "held that the weighing equation in K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments" .... As in *Kleypas*, the Kansas Supreme Court clearly rested its decision here on the Eighth and Fourteenth Amendments to the United States Constitution. We, therefore, have jurisdiction to review its decision. *See Michigan v. Long*, 463 U.S. 1032, 1040–1041 (1983) (several internal citations omitted).

[5] Respondents argue that U.S. military procedures for considering mitigation differ from the situations here, but that assertion is far from self-evident. The *only* instruction U.S. military procedures require with respect to consideration of mitigation is that the members "must consider all evidence in ... mitigation," R.C.M. 1004(b)(6), which is indistinguishable from the charge here to "consider and weigh everything admitted into evidence ... that bears on ... a mitigating circumstance." Gleason App. 129. The U.S. military does *not* require (nor it appears, give) an affirmative instruction that mitigation *need not be proven beyond a reasonable doubt*, nor an instruction that mitigation is *not subject to any burden of proof*. Respondents' cited case is not to the contrary and effectively countenances the Kansas approach. Gleason Br. 31; RC Br. 54 n.8.

B. The Eighth Amendment does not impose a *per se* rule requiring burden of proof (or the lack thereof) instructions for mitigating circumstances when a state imposes no burden of proof.

A *per se* rule here cannot be squared with the Court's precedent. Respondents claim not to defend a *per se* rule, instead dismissing it as a "straw man," Gleason Br. 1, rewriting the question presented to avoid it, RC Br. (i), 35-55, or both, JC Br. 43. The Court consistently has rejected claims that the Eighth Amendment imposes any *per se* rules on how states structure jury consideration of mitigating circumstances in capital cases. For example, in *Buchanan v. Angelone*, 522 U.S. 269, 275-276 (1998), the Court emphasized that the Eighth Amendment does not require any particular instructions regarding a jury's consideration of mitigating evidence, and reiterated that "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to mitigating evidence." *Buchanan* further observed that the Court had "never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." 522 U.S. at 276; *see also Weeks v. Angelone*, 528 U.S. 225, 233 (2000) (following *Buchanan*). In *Kansas v. Marsh*, 548 U.S. 163, 171 (2006), the Court again emphasized "the States are free to determine the manner in which a jury may consider mitigating evidence."[6]

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[6] Reginald Carr's argument that a State could not require a capital defendant to prove mitigating circumstances beyond a reasonable doubt, RC Br. 43-44, is thus foreclosed by precedent and in any

Respondents' attempts to distinguish these cases fail. Their records and underlying state laws may have differed from here, but these cases stand for the proposition that the Eighth Amendment imposes no *per se* requirement for jury instructions on mitigation.

C. Respondents effectively urge this Court to adopt the *per se* rule they purport to disavow.

Respondents conspicuously fail to offer a cure for their complaints about these jury instructions. Nor can they. Short of an affirmative instruction, what other instructions would satisfy Respondents here? The logical conclusion of Respondents' arguments is that the Eighth Amendment will *always* be violated unless the jury is affirmatively instructed on the burden of proof (or lack thereof) for mitigation.

Gleason complains of "the instructions' repeated emphasis on the 'beyond a reasonable doubt' standard" in contrast with "their total silence on Mr. Gleason's burden of proof regarding mitigation evidence." Gleason Br. 15. But since *every* capital sentencing jury *must* be instructed on the government's burden to prove aggravating circumstances beyond a reasonable doubt, Gleason's argument countenances only mitigation instructions that avoid "total silence"—presumably through an *affirmative* instruction.

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event not a question presented here. This Court certainly never has adopted such a rule, and should not do so now. Kansas imposes *no* burden of proof on mitigation, only a burden of production. *Marsh*, 548 U.S. at 178.

Reginald Carr's "arbitrariness" response makes matters worse for Respondents. RC Br. 55-58. Like the Kansas Supreme Court in *Gleason*, he posits jurors may not be "left to speculate," but he goes further and claims unconstitutional arbitrariness from different jury interpretations of mitigation evidence as it relates to different defendants, thus "impos[ing] such a burden on *some* defendants but not others." RC Br. 55. Logically, the only *possible* cure for the harm he claims is a uniform, affirmative jury instruction about the burden of proof applicable to mitigation for all defendants in all cases.

Gleason's extensive discussion of academic studies and other jurisdictions' practices further urges this Court to adopt a *per se* rule. Gleason Br. 25-32. Academic studies having no connection to these cases are irrelevant to whether the *Boyde* standard was violated here. Likewise, that other jurisdictions may by local policy require juries be affirmatively instructed is irrelevant to these cases except to urge this Court to transform those policies into a federal constitutional imperative.

Thus, although Respondents ostensibly argue they are not seeking a *per se* rule, they offer nothing short of such a rule to cure their complaints. Adopting such a rule would require the Court to turn its back on nearly thirty-five years of precedent, a step not justified here.

II. The jury instructions were constitutionally sound under *Boyde v. California*, because there is no reasonable likelihood these juries applied them in a manner that precluded giving effect to all relevant mitigating evidence.

Instead of defending the *per se* rule the Kansas Supreme Court *actually* used to decide these cases, Respondents argue ways the Kansas court *might* have found *these* instructions, on *these* records, to be unconstitutional. Their straw man arguments are unconvincing.

A. The instructions in all three cases satisfied the *Boyde* standard.

The *Boyde* analysis demonstrates the instructions in all three cases here were constitutional. The standard is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. The standard is *not* whether there is *no* chance of confusion under any possible hypothetical circumstance, *id.*, nor is it whether there is *any* possibility of a mistaken interpretation. *Weeks*, 528 U.S. at 236. Reversal is not warranted "where the claimed error amounts to no more than speculation." *Boyde*, 491 U.S. at 380. The instructions should not be "pars[ed]" for "subtle shades of meaning" through "technical hairsplitting." *Id.* at 380-381.

In the present cases, the language of the instructions, the State's responses to Respondents' mitigation evidence, and the parties' closing arguments

all informed jurors they could consider any and all relevant mitigation that had been presented. Contrary to Respondents' newfound post-trial complaints, no burden of proof for mitigation was argued, suggested, or implied by the trial courts, the State, or Respondents' own counsel. Instead, the records as a whole properly and repeatedly emphasized the open-ended nature of the juries' consideration of mitigation evidence.

First, no counsel for any Respondent objected to any instruction given in these cases on the ground it was ambiguous, misleading, or confusing with respect to the burden of proof for mitigation. No one proposed a burden of proof instruction. Two experienced trial judges, several prosecutors, and several seasoned capital defense attorneys reviewed the instructions and failed to see the problem about which Respondents now vigorously complain in hindsight.

Second, despite Respondents' tortured attempts to contrive potential confusion, the instructions made clear the jury's ability to consider any and all mitigating evidence. For instance, Instruction No. 2 in *Gleason* directed the jury that "you should consider ... *everything admitted into evidence* ... that bears on ... a mitigating circumstance." Gleason App. 129 (emphasis added). Importantly, *Gleason* Instruction No. 7 emphasizes the jury's open-ended ability to consider and evaluate mitigation. *See id.* at 131. These instructions directed the jury that it was to "decide"—not to find proven—what counts as mitigation, and do so based on "the facts and circumstances of the case," not even on the evidence presented (much less on proven circumstances). *Id.* at

132 ("You may further consider as a mitigating circumstance any other aspect ... which was presented ....").

Moreover, this instruction repeatedly directed the jury to make a "determination" of what is mitigation; it did not say mitigating circumstances must be *proven* or *established*. The juxtaposition of a burden of proof for the State to establish aggravating factors beyond a reasonable doubt versus the instruction that mitigation is merely to be determined by each juror helps make clear, not murky, that the State bears a burden of proof while Respondents bore none. Instruction No. 7 informed jurors in six separate references to "consider" mitigating information "presented" in order to "determine" whether the State had proven the death penalty "should be imposed." This instruction did what it was supposed to do—inform the jury the State must prove the existence of aggravators, a fact question, and further prove the death penalty "should be imposed"—a value judgment and moral conclusion. Only once, in its seventh reference to mitigation, does Instruction No. 7 mention mitigation "found to exist." *See Jones v. United States*, 527 U.S. 373 (1999) (Despite "absence of an explicit instruction," there was no "inference that the jury was confused" because "[o]ur decisions repeatedly have cautioned that instructions must be evaluated not in isolation but in the context of the entire charge."). Thus, despite Respondents' "technical hairsplitting," the *Gleason* instructions could hardly have been more clear (absent, of course, the *per se* instruction Respondents disclaim they are seeking).

The *Carr* instructions are virtually indistinguishable from the *Gleason* instructions. *See* JA

378-383 (Reginald) and JA 385-390 (Jonathan). Moreover, in the *Carr* cases, the trial court further instructed the jury at the start of the sentencing proceeding that the jury "*shall consider* aggravating or mitigating circumstances *relevant* to the question of the sentence..."). JA 60 (emphasis added). The court also told the jury that lawyers would "present" information to the jury and discuss things "they are going to *bring up* for your consideration in mitigation." JA 71. The court notably used words such as "present" and "bring up"; never did it say or suggest that the Carrs had to "prove" mitigation.

Respondents' complaint about infrequent reference in the instructions (or in closing arguments) to mitigating circumstances "found to exist" or "shown to exist," Gleason Br. 17-18, RC Br. 44-45, 54; JC Br. 44, falls far short of demonstrating a reasonable likelihood the juries believed the instructions imposed *any* burden of proof (much less an incorrect burden) on mitigation. Instead, such language reflects common sense: in what world would a jury reasonably consider mitigating circumstances that *do not exist*? The "to exist" language does not imply any burden of proof, nor is it confusing or ambiguous, especially when combined with the language that "[t]he *determination* of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case," and "[m]itigating circumstances are to be *determined* by each individual juror." Gleason App. 131; JC App. 570; RC App. 507 (emphasis added).

Third, Respondents all mischaracterize the State's responses to and comments about the mitigation evidence. In fact, in all three cases the prosecutors

questioned whether Respondents had *presented any evidence* in support of *some* alleged mitigating circumstances. In many respects, however, the State did not challenge the mitigation presented at all, and instead only argued whether it was relevant and outweighed the aggravating factors. Indeed, Reginald's counsel specifically acknowledged the State did not challenge the existence of many of the presented mitigators. JA 419 ("After we have talked about all the bad things that happened in Reggie's life, I mean, you didn't see any witnesses from the State of Kansas come in here and say I grew up and I lived next to these guys, they had a wonderful home. ... You didn't see a forensic psychologist come in here and say the studies from the Department of Justice and the Surgeon General's Office and the FBI, they really apply in this particular case because those are all different. You didn't see anybody come in here and do that.").

For the State to ask such questions is proper as a matter of law and does not equate to arguing Respondents failed to meet a non-existent burden of proof. As this Court recognized in *Marsh*, Kansas law does not impose a burden of proof on mitigation, but it does impose a *burden of production*, and properly so. *Marsh*, 548 U.S. at 178. Furthermore, this Court's cases long have recognized that mitigation evidence must be "relevant" before its consideration is constitutionally required. *See Johnson v. Texas*, 509 U.S. 350, 362 (1993).

In context, the prosecutors here responded to the mitigation evidence with production, relevance, and weight in mind, well within the bounds of proper commentary. In all three cases, the prosecution's

primary approach was to question whether Respondents had produced *any* relevant evidence in support of *some* alleged mitigating circumstances, or to argue that the mitigation evidence carried little *weight* in comparison to the aggravating circumstances. *E.g.* JA at 64 ("That is the responsibility of the defendants, to *bring that evidence to you* so that you may weigh and measure it ...."); *id.* at 194-202 (questioning "relevance" of the brain scan evidence); *id.* at 435 ("Mitigating circumstances under the law as you remember are those that reduce the degree of moral culpability. How has anything that they have *said* done that?") (emphasis added); Gleason App. 148 ("Did you hear *any* evidence about that?") (emphasis added). At no point did the State argue or imply the jury should not consider relevant evidence the Respondents presented.

Fourth, the closing arguments of *all* parties emphasized the jury's open-ended ability to consider all mitigation evidence presented, as well as to determine how to evaluate that evidence. In no instance did the State tell, suggest, or imply to these juries that mitigation was subject to a burden of proof beyond merely *producing something* the jury could consider. *See, e.g.*, JA 62 (aggravators "must outweigh any mitigators that are *presented* by the defendants ....") (emphasis added); *id.* at 392 (sentencing phase is a chance for the defendants to *present* information to you as a jury in some way to respond to the question of whether or not the death penalty is appropriate, to mitigate, to lessen, to look at them in a different light. And I believe that the evidence has been *quite a bit of evidence that has been presented by the defendants.*") (emphasis added); *id.* at 396 ("And the question is what mitigates punishment? Something for the jury to

decide."); *id.* at 443 ("Anything that would reduce culpability has not been *presented* here.") (emphasis added); Gleason App. 142 ("[I]n the determination of your sentence, you should consider and weigh everything admitted into evidence ... that bears on ... mitigating circumstances ...."); *id.* ("Everything you have heard ... you get to consider all the evidence ... everything you can consider."); *id.* at 149 (existence of mitigator "[a]gain, not [in] dispute.").

Conspicuously absent from Respondents' briefs is any discussion of *their* closing arguments. In fact, they, too, told each jury its discretion was unfettered. For example, Gleason's counsel pointed out mitigating circumstances could be "anything in your independent moral assessment" including mercy. Gleason App. 154-155. He also noted that mitigation was not subject to any unanimity requirement, *id.* at 155, and that under Kansas law, there is a "presumption of [a] life [sentence] in a capital case," a presumption that only required the vote of a single juror to give it effect. *Id.* at 161-162. He emphasized "that you may further consider as a mitigating circumstance any other aspect of the defendant's character, background, record, or other aspects of the offense ... ," *id.* at 155, and reinforced the open-ended nature of the jury's task to determine what may constitute mitigation. *Id.* ("... if you believe something is a mitigator, it goes on your scale ....").

Similarly, Jonathan's counsel repeatedly emphasized that mitigation was whatever the jury decided it was and that there were no constraints on their ability to consider mitigation. *See, e.g.*, JA 68 ("Mitigating evidence is what you decide it is."); *id.* at

426 ("Now I think you needed to know some things about Jonathan. Maybe won't make any difference to you, but it's my responsibility to *tell you some things* and to *present* you some evidence about him before you can sentence him ... We tried not to *present* [trivial information as mitigators]. ... And it is for you to *decide* how much impact a bad family life has.") (emphasis added); *id.* ("[Y]ou need to make of it and give it the weight you think it deserves."); *id.* at 429 ("Is this mitigating? Is this something you should *consider* before you impose the ultimate punishment on him? Absolutely.") (emphasis added); *id.* at 433 ("[A]ny one of you can decide to save this young man's life. Any one of you.").

Reginald's counsel made similar arguments. *See, e.g.*, JA 408 ("He told you, he says, I don't have any confirmation on that. I don't have any confirmation. It is all for you to consider to determine whether or not you want to give that any weight."); *id.* at 415 ("You have the right to use common sense in evaluating this evidence.").

On these records, there is no reasonable likelihood the juries applied the instructions in a way that prevented the consideration of constitutionally relevant mitigation evidence.

B. There was *no* indication of juror confusion and Respondents offer only "rank speculation" to the contrary.

The instructions given in these cases are not ambiguous, vague, or confusing. There is no indication in these records of juror confusion, and Respondents point to none, offering only "rank speculation," *Gleason*

App. 121 (Biles, J., dissenting), to support their arguments. There is no affirmative statement or language anywhere in the instructions that suggests, much less imposes, a beyond-a-reasonable-doubt burden of proof for mitigating circumstances. Lower courts confronting this question have consistently rejected the argument that instructions like these are unconstitutional. *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999); *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994); *Matheny v. State*, 688 N.E.2d 883, 902 (Ind. 1997). These decisions are entirely consistent with this Court's precedents; Respondents' unpersuasive attempts to distinguish them point to *no* contrary decisions.

In *Ayers v. Belmontes*, 549 U.S. 7 (2006), this Court considered similar instructions, applied *Boyde*, and found no constitutional error. Notably, the Court interpreted the *Belmontes* instructions in the manner "most consistent with the evidence presented to the jury, the parties' closing arguments, and the other instructions provided by the trial court," 549 U.S. at 16, commented favorably on the prosecution's critique of the *weight* of the mitigation evidence, *id.* at 16-21, and concluded that the back-and-forth discussion of mitigation evidence by the prosecutor and defense counsel helped ensure the jury gave full consideration to the evidence because "[i]t is improbable the jurors believed that the parties were engaging in an exercise in futility when respondent presented (and both counsel later discussed) his mitigating evidence in open court," *id.* at 16-17. Moreover, the "back to back" juxtaposition of instructions on aggravators and mitigators furthered jury understanding, not confusion. *Id.* at 21.

As in *Belmontes,* likewise here:

> [Each of these juries] heard mitigating evidence, the trial court directed the jury to consider all the evidence presented, and the parties addressed the mitigating evidence in their closing arguments. This Court's cases establish, as a general rule, that a jury in such circumstances is not reasonably likely to believe itself barred from considering the defense's evidence as a factor "extenuat[ing] the gravity of the crime."

549 U.S. at 24. There is no reasonable likelihood these juries believed themselves so barred.

C. The Kansas "mercy" instruction forecloses any speculative possibility jurors declined to give effect to all mitigation presented.

Finally, "[t]he 'mercy' jury instruction alone forecloses the possibility" of Respondents' misplaced concerns, *Marsh* 548 U.S. at 176 n.3, because "a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance." *Id.* Under Kansas law, a capital sentencing jury is informed that mercy "can itself be a mitigating factor." Gleason App. 131; JC App. 569-570; RC App. 503-504. "Mercy" is not amenable to "proof" or subject to any evidentiary burden; instead, it is a moral judgment, an emotional concept, an act of grace subject to the judgment of each individual juror. Given that, no juror could reasonably think a defendant's life could be spared only if the defendant satisfied some evidentiary burden of proof.

These records contain numerous pleas for mercy. In all three cases, the instructions informed the jury it

could consider "[t]he appropriateness of exercising mercy" in deciding whether the State has proved "the death penalty should be imposed." Gleason App. 131; JA 385 (Jonathan), JA 382 (Reginald). Prosecutors in each case repeatedly told the jury it could exercise mercy.[7] In closing, Gleason's counsel told the jury "mercy is a mitigating circumstance," Gleason App. 155, and asked the jury to grant it, *id.* at 161 ("We're asking you to show mercy where mercy was not shown."); *id.* at 162 ("Any one of you who says no ... be it mercy ... guarantees Sidney life."). Reginald Carr's counsel made a similar plea. JA 422 ("You get to have the opportunity to extend mercy to another human being ... you have the opportunity to extend that mercy to him."); *id.* at 423 ("[Y]ou have the power to save."). So did Jonathan Carr's counsel. JA 433 ("[A]ny one of you can decide to save this young man's life. Any one of you. You can decide that there is some good there. There is something worth saving.").

Under Kansas law, the "mercy" instruction effectively guarantees no jury could reasonably believe it was precluded from considering *anything and everything* produced as mitigation. There is no

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[7] *See, e.g.*, Gleason App. 147 (mentioning "mercy" seven times including "Mercy. It's all up to you." and "[Do] [t]hose actions call for mercy? Your decision."); *id.* at 163-164 (mentioning "mercy" five times including "Do his actions call for your mercy? Because if you choose to do it, you can."); JA 400 (acknowledging defense pleas to "be given mercy"); *id.* at 401 (same); *id.* at 404 ("Ladies and gentlemen, ... the Court has told you you can consider sympathy and you can consider mercy for these two defendants"); *id.* at 437 (Defendants "beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need."); *id.* at 444 (twice mentioning "mercy").

"reasonable likelihood" these juries understood the instructions to preclude them from granting mercy unless mitigating circumstances had been "proven" or "found."

* * *

Respondents' arguments boil down to nothing more than sheer speculation that jurors somehow were confused or misled into disregarding mitigation evidence produced at trial. No Respondent points to *any* aspect of these records that even suggests any *actual* juror confusion. Nothing in these records suggests *any* reasonable likelihood jurors in these cases misunderstood their task to the detriment of Sidney Gleason, Jonathan Carr, or Reginald Carr.

Rather, the jurors' "commonsense understanding of the instructions," *Boyde*, 494 U.S. at 380-81, in light of the entire trials readily explains the outcomes here. These jurors properly considered *everything* presented; they then individually considered each Respondent's weak mitigation case, and unanimously concluded that each Respondent's mitigation did not outweigh the uncontested and aggravated brutality of the premeditated crimes each Respondent committed. The juries' "reasoned moral response" that "death is an appropriate punishment" for each of these individual Respondents "in light of [their] personal history and characteristics and the circumstances of the offense," *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007), did not violate the Eight Amendment.

CONCLUSION

The State of Kansas respectfully requests that the Kansas Supreme Court's decisions in these three cases be reversed.

Respectfully submitted,

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